LIBRARY
SUPREME COURT U. S.

OCT 4 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 12

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONER

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Attorneys for Petitioner

SMITH BROS. CO. INC., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

PAGE

Summary of Argument 2

Argument:

I. Matters On Which the Parties Are Agreed 4

II. Matters on Which the Parties Disagree .. 5

A. The Present Vitality of *Kahriger* and *Lewis* 5

B. Accommodation of the Taxing Power and the Privilege 11

C. Disposition of This Case if a Use Restriction Should Be Adopted 18

D. The Communications with the Jury .. 20

Conclusion 22

TABLE OF CITATIONS

CASES

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) 5, 6, 8, 14, 16

Bouie v. City of Columbia, 378 U.S. 347 (1964) 18

Chapman v. California, 386 U.S. 18 (1967) 20

Counselman v. Hitchcock, 142 U.S. 547 (1892) 12

Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966) 14, 17

Gould v. Argiro, 422 Pa. 433, 220 A.2d 654 (1966) 20

Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936) 10

Johnson v. New Jersey, 384 U.S. 719 (1966) 19

Johnson v. United States, 318 U.S. 189 (1943) 20

Kersey Mfg. Co. v. Rozic, 422 Pa. 564, 222 A.2d 713 (1966) 20

Knowlton v. Moore, 178 U.S. 41 (1900) 10

Lewis v. United States, 348 U.S. 419 (1955) .. 2, 5, 6, 11

License Tax Cases, 5 Wall. 462 (1867) 10

McCray v. Illinois, 386 U.S. 300 (1967) 14

McCray v. United States, 195 U.S. 27 (1904) 10

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 9, 13, 15, 16

Table of Citations.

CASES

	PAGE
Raley v. Ohio, 360 U.S. 423 (1959)	18
Shapiro v. United States, 335 U.S. I (1948)	4
Stevens v. Marks, 383 U.S. 234 (1966)	13, 18
Stovall v. Denno, 388 U.S. 298 (1967)	19
United States v. Chandler, ... F.2d .... (2d Cir. 1967)	15
United States v. Kahriger, 345 U.S. 22 (1953)	2, 5, 6, 11
United States v. Ross, 374 F.2d 227 (6th Cir. 1967)	14, 17
United States v. Sullivan, 274 U.S. 259 (1927)	2, 4, 5, 12
United States v. Whiting, 311 F.2d 191 (4th Cir. 1962)	14
Yarsunas v. Boros, 423 Pa. 364, 223 A.2d 696 (1966)	20

STATUTES

18 U.S.C. § 1084	17
§ 1406	13
§ 1952	17
§ 2424(b)	13
§ 3486(c)	13
26 U.S.C. § 4401	4
§ 4422	16
§ 5821	10
Act of Jan. 18, 1815, c. 23, § 1, 3 Stat. 186	10

MISCELLANEOUS

Federal Offenders in the United States District Courts	19
Lipton, Record Keeping and the Privilege Against Self-Incrimination, N.Y.U. 14th Ann. Inst. on Federal Taxation 1331 (1956)	12
Mansfield, The Albertson Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103	7, 8

NO. 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

It is always with reluctance that counsel impose a reply brief upon this Court, but in this case there have been relevant developments since petitioner submitted his original brief in November, 1966.* In particular, it is thought that it may be helpful to the Court to identify those matters on which the parties, as shown by their various briefs, now agree, and thus to isolate those issues on which the parties continue to disagree.

*Counsel were advised by the Clerk that the Brief for the Petitioner on Reargument (hereafter Pet. Rearg. Br.) "should merely cover the additional questions raised by the Court's order," and the brief filed in August is so limited.

SUMMARY OF ARGUMENT

The parties agree that the "required records" doctrine has no direct bearing on this case, and that the excise tax here in question cannot be paid without filing Form 730, the prescribed form for that tax. They further agree that this case is not controlled by *United States v. Sullivan*. Finally, they agree that the power of the government to tax and the privilege of the individual not to incriminate himself are both important constitutional provisions, and should be read in such a way that one does not destroy the other.

The parties disagree on the continued vitality of *United States v. Kahriger* and *Lewis v. United States*. Although those decisions are not directly in point with regard to the excise tax, the rationale the United States now finds in those cases would be, but the rationale — that there is no compulsion since gambling is a voluntary act — is thought unsound by petitioner. The argument advanced by the United States that a tax of this kind on gambling is valid, but that a tax on robbers or kidnappers would not be since the latter are not a business, ignores the reality of organized crime and puts an unjustified limitation on the taxing power by purporting to limit it to businesses.

The parties disagree also on how the accommodation should be made between the taxing power and the privilege against self-incrimination. The use-restriction proposed by the United States is only one possible way of making this accommodation, it is an undesirable way of doing it, and in any event the choice is properly for Congress rather than this Court. Even if the Court could properly adopt the use-restriction, petitioner con-

tends that reversal would be required in the present case since such a restriction did not exist when petitioner failed to pay the tax here involved, and at that time he was correct in supposing that payment of the tax could be used to incriminate him.

Finally the parties continue to disagree on whether reversal is required because of the communications between the trial judge and the jury outside of the presence of defendant and his counsel.

ARGUMENT

I. Matters On Which The Parties Are Agreed

On the two questions on which the Court asked discussion in its order granting reargument the parties are in complete agreement. Petitioner and the United States agree that the "required records" doctrine of *Shapiro v. United States,* 335 U.S. 1 (1948), has no direct bearing here since the present case involves reports that are required to be filed with the government as distinguished from records that are required to be kept incident to a tax or regulatory program (Pet. Rearg. Br. 5-20; Govt. Rearg. Br. 8-12). Petitioner and the United States also agree that the obligation to pay the excise tax imposed by 26 U.S.C. § 4401 can be satisfied only by filing Form 730, the required tax return (Pet. Rearg. Br. 21-25; Govt. Rearg. Br. 37-41). It is for the Court, of course, to decide if the parties are right on these points, and we are prepared to discuss these questions at oral argument if the Court should wish us to do so, but for the present there is no issue on these matters.

The parties agree, too, that the present case is not controlled by *United States v. Sullivan,* 274 U.S. 259 (1927), and that that case involved a readily distinguishable situation (Pet. Br. 17-19; Govt. Br. 11; Govt. Rearg. Br. 24-26). The United States is concerned that a decision in favor of petitioner in the present case will lead to an attack upon *Sullivan.* Perhaps such an attack will come, given the willingness of some defendants to clutch at any straw, but it would surely not succeed. It is an easy thing for the Court, in deciding

this case, to explain why *Sullivan* is distinguishable, just as the Court did in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

Finally, petitioner agrees with the argument of the United States that an accommodation must be sought between the power to tax and the privilege against self-incrimination that will not infringe on either of these important constitutional provisions (Govt. Rearg. Br. 13). Indeed we pointed out in our initial submission (Pet. Br. 24) that a holding for petitioner here need not "have a destructive effect on the fisc." As will be seen below, the parties do disagree, however, on what a proper accommodation of these interests is.

II. Matters On Which The Parties Disagree

A. The Present Vitality of Kahriger and Lewis

We read the decisions in *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), as holding that the occupational tax on wagering does not compel self-incrimination since that tax is prospective only. So read those precedents do not apply here, since the excise tax looks to the past rather than the future. The view that the privilege applies only with regard to past acts seems unsound (Pet. Br. 10-12) but we need not pursue the point further since at oral argument in January counsel for the government disclaimed reliance on that portion of the *Kahriger* and *Lewis* holdings.

The United States has now developed more fully (Govt. Rearg. Br. 12-26) its argument that the real basis of *Kahriger* and *Lewis* is that the decision to en-

gage in gambling is a voluntary decision, and that such a decision may be treated "as the equivalent of a non-compelled choice in terms of Fifth Amendment rights" (Govt. Rearg. Br. 23). Such a rationale, if sound, would reach the excise tax just as fully as it does the occupational tax. There are several reasons why such a rationale is unsound.

First, the United States recognizes (Govt. Rearg. Br. 26) that *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), makes it difficult to adopt the rationale it ascribes to *Kahriger* and *Lewis*. Membership in the Communist Party is voluntary. It could have been argued as forcefully there as here that if one joins the Communist Party or remains a member of it, knowing that Congress has attached the condition of registration to membership, the decision to join is "a non-compelled choice in terms of Fifth Amendment rights." This Court held, however, that registration would violate the privilege against self-incrimination. The United States undertakes to distinguish this case from *Albertson* on the ground that a registration and return requirement is valid if it serves a governmental interest separate and independent from an interest in the underlying activity as such (Govt. Rearg. Br. 14-15). This distinction is difficult to understand. The government would be precluded from requiring information if it had a legitimate interest in the activity involved, but would be allowed to require the information if it had some other incidental interest for which the information would be helpful. The information would be equally incriminating in either case. The proposition that the government can obtain incriminating information indirectly but not directly is hardly an ap-

pealing one. And the distinction seems almost purely verbal. If the governmental interest in the present case is stated as collection of revenue, this would be a "separate and independent" interest, but if it is characterized as putting a tax on gambling, would it not have to be said that the government's interest is in the underlying activity of gambling?

A second answer to the "non-compelled choice" rationale the United States now advances is provided by Professor Mansfield, on whose thoughtful article the United States has quite properly relied throughout its most recent brief. Professor Mansfield says:

> It is clear that this argument must be rejected and that the privilege cannot be considered forfeited in these circumstances because of the fact of choice. Choice is indeed a factor to which the law frequently attaches consequences, but it does so only when this will aid in achieving some end defined by policy. It does not attach consequences to choice without regard to some objective. The fact of choice alone can hardly ever be considered a sufficient explanation of a legal result. To hold that since the defendant made a choice to commit the primary offense the privilege is lost would be to abolish the privilege in one of its central applications, to abolish it in cases in which it had always historically applied, to defeat its very purpose. The evils intended to be avoided by the privilege would not in fact be avoided. Even though the defendant did make a choice in committing the primary offense, once he did so he was confronted with the dilemma whether to incriminate himself

> or run the risk of punishment for failure to do so. It is the evils and abuses that inhere in this dilemma that the privilege is intended to avoid, and these evils and abuses are not eliminated simply because of the defendant's antecedent choice. This is true even though the defendant had no right to choose as he did, no right to commit the primary offense. The privilege is designed to provide protection even for those who have chosen to commit crime.

Mansfield, *The Albertson case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 130-131.

Finally, as we have suggested briefly before (Pet. Br. 14), every criminal has a free choice whether to commit a crime. Every such person knows that there are laws on the books by which citizens may be subpoenaed and required to testify. Yet the "voluntary" nature of his choice to become a criminal has never been thought to defeat his privilege against being compelled to testify as to his crimes.

To this the United States offers two answers. First, it rejects the analogy because "unlike the witness called upon to testify before a grand jury or an investigative body, who cannot generally choose to appear or not, the prospective gambler can choose to gamble or not to gamble" (Govt. Rearg. Br. 23 n. 21). This misses the point. The choice is whether to engage in the primary activity, whether it be gambling, white slavery, or whatever. There is no choice whether to tell about one's conduct, whether asked on a Form 730 or by a grand jury, except to the extent that the Fifth Amend-

ment provides a choice. The Fifth Amendment should be as applicable in one case as in the other.

Second, the United States argues at some length that a decision that gamblers must register and file returns does not mean that the same requirements could be imposed on kidnappers or robbers (Govt. Rearg. Br. 16-22). The essence of the argument is that gambling is a business, kidnapping and robbery are not, and that Congress would therefore not have constitutional authority to tax kidnapping and robbery. We disagree with every part of this argument.

The suggestion that crimes such as kidnapping and robbery — or murder, prostitution, and the like — are never conducted as a "business," in the sense that gambling is, is a novel one. It is more than a mere play on words to remind the Court of "Murder, Inc." and to note that on the pages of the United States Reports there is a reference to "commercial larceny." *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 95 (1964) (concurring opinion). Every newspaper reader today is aware of the existence of organized crime, and knows that the most serious kinds of crimes are within its scope.

Even more surprising, however, is the assumption in this argument of the United States that an occupational tax or an excise tax can only be laid on those activities that have the characteristics of a business. This would be a far more drastic limitation on the taxing power than that for which petitioner here contends. The Constitution imposes no such limit, and it has long been understood that "the taxing power conferred by the Constitution knows no limits except those

expressly stated in that instrument * * *." *McCray v. United States,* 195 U.S. 27, 59 (1904); *License Tax Cases,* 5 Wall. 462, 471 (1867). Over the years Congress has many times imposed taxes on matters that have none of the characteristics of a business. A tax was placed on "household furniture kept for use" by the Act of Jan. 18, 1815, c. 23, § 1, 3 Stat. 186. The tax on the making of firearms, 26 U.S.C. § 5821(a), is expressly made inapplicable to "any person who is engaged within the United States in the business of manufacturing firearms." 26 U.S.C. § 5821(b)(1). Taxes on the transmission of wealth from the dead to the living have been upheld, *e.g., Knowlton v. Moore,* 178 U.S. 41, 56 (1900), though it can hardly be said that anyone is in the business of dying.

The sound view, it is submitted, is that except for the constitutional requirements of apportionment of direct taxes and uniformity of indirect taxes, there is no activity and no transaction that is beyond the power of Congress to tax. A particular tax may fall, however, because of other constitutional protections. A tax on the business of selling advertising would be a legitimate excise tax, but if it is so devised as to limit the circulation of information to which the public is entitled under the First and Fourteenth Amendments, the power to tax must give way to those constitutional protections. *Grosjean v. American Press Co., Inc.,* 297 U.S. 233, 250 (1936). A tax on the acquisition of property by Negroes would fall, not because Congress cannot tax nonbusiness conveyances, but because equal protection notions inherent in the Due Process Clause of the Fifth Amendment make classification in racial terms invalid. An excise tax on robberies would be bad, not because

Congress cannot tax such criminal transactions, but because there would be no way to pay the tax without self-incrimination.

For the reasons given petitioner disagrees with the United States, and believes that *Kahriger* and *Lewis* have no continuing vitality.

B. Accommodation of the Taxing Power and the Privilege

As noted earlier, we agree with the United States that an accommodation can and should be made between the power to tax and the privilege against self-incrimination. We disagree on how to do this. The United States argues alternatively that its reading of *Kahriger* and *Lewis* provides a suitable accommodation, or that a use-restriction on tax returns would do so. We have indicated why the former should be rejected, and shall indicate here why the Court should not adopt the latter.

It is true, as the United States says, that voluntary compliance accompanied by some degree of disclosure is the bedrock of our tax structure (Govt. Rearg. Br. 13). Indeed this is one of the strongest arguments against the tax here in question. "It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation." *United States v. Kahriger,* 345 U.S. 22, 36 (1953) (Jackson, J., concurring).

It is significant that the income tax is successfully administered though the privilege against self-incrimi-

nation is fully respected. The taxpayer may claim the privilege on his return if the return call for incriminating answers, *United States v. Sullivan*, 274 U.S. 259, 263 (1927), and the Treasury Department recognizes that the taxpayer's records are within the constitutional privilege. Lipton, *Record Keeping and the Privilege Against Self-Incrimination*, N.Y.U. 14th Ann. Inst. on Federal Taxation 1331 (1956). The income tax applies to money illegally obtained, and the record in this case shows that petitioner has paid a substantial income tax each year.

As the example of the income tax shows, the United States can satisfy its need for revenue without abridging the constitutional privileges of its citizens. The simplest and neatest solution would be to do without the taxes on wagering. The figures offered by the United States (Govt. Rearg. Br. 18 n. 17) show that these taxes produce at most a net revenue of $5 million per year. It would be better to do without five million dollars per year than to jeopardize the good will of the people toward their tax system by a statute that appears disingenuous.

If Congress is seriously interested in obtaining revenue from this source, there are ways it can do so without infringing the privilege against self-incrimination. Indeed the government's brief points out the possibility of using a less specific and more neutral form for the wagering excise tax (Govt. Rearg. Br. 40). If a neutral form is sufficient for the income tax, there is no apparent reason why it would not suffice for this excise tax. It is harder to see how a neutral form could be provided for the occupational tax on wagers, but this,

though a convenience for enforcing the excise tax, is hardly essential to it.

Or if Congress really wants these revenues it can do what it has done more than 40 times and provide immunity for prosecution to those who pay the tax. Congress was willing to do without prosecution under the Mann Act in order to get information from persons harboring alien women in houses of prostitution. 18 U.S.C. § 2424(b). If there is a real possibility of obtaining $5 billion in annual revenue (Govt. Rearg. Br. 17 n. 16), Congress might think this justified interfering with state prosecution of gamblers. Congress makes a similar choice whenever it enacts an immunity statute broad enough to bar a state prosecution of a person, as in such statutes as 18 U.S.C. §§ 1406, 3486(c).

Finally there is the possibility that Congress might enact a restriction on the use of information provided in connection with these taxes. For the present we assume that such a use-restriction would be constitutional under the test of *Counselman v. Hitchcock,* 142 U.S. 547, 585 (1892). Compare *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 79 (1964), with *Stevens v. Marks,* 383 U.S. 234, 244-245 (1966). Few things in life come without a price — and the price of such a use-restriction is higher than the argument for the United States would make it appear. The use-restriction for which the United States contends would of course bar admission into evidence of the federal tax return. Critical questions would then be raised about whether the federal return can be used as an investigatory lead, and, if so, whether it was so used in a particular case. The first question would seem to be an-

swered, despite the government's noncommittal view about it (Govt. Rearg. Br. 35 n. 32), by *Albertson*. The Court held insufficient the purported immunity provision there involved because "it does not preclude the use of the admission as an investigatory lead, a use which is barred by the privilege." 383 U.S. at 80. The second question would have to be litigated in every prosecution, state or federal, of a gambler. This is not met by the rather debonair argument that this would occur "only infrequently, if ever, since the identity of those engaged in gambling is generally not a secret to most State and local law-enforcement officials" (Govt. Rearg. Br. 35 n. 32). There is evidence in the reported cases that payment of the tax is today used not uncommonly as an investigatory lead. *E.g., United States v. Ross,* 374 F.2d 227 (6th Cir. 1967); *Gillespie v. United States,* 368 F.2d 1 (8th Cir. 1966); *United States v. Whiting,* 311 F.2d 191 (4th Cir. 1962). Adoption of a use restriction would have several possible consequences. Prosecution of gamblers, already sporadic, would decrease, because of the difficulty of showing that the federal tax payment was not the investigatory lead. Either the prosecutor would not have to disclose the identity of his informants, in which case the protection to the defendant would be meaningless, or he would be required to make such disclosure, in which case there would be great reluctance to prosecute. Cf. *McCray v. Illinois,* 386 U.S. 300 (1967). The temptation to law enforcement officials to lie about whether they used the tax payment as an investigatory lead would be very great. A use-restriction may be justifiable in the *Murphy* context for there "the very fact that a witness is called in a state crime investigation is likely to be based

upon knowledge, or at least a suspicion based on some information, that the witness is implicated in illegal activities, which knowledge and information are probably available to federal authorities." 378 U.S. at 102 (concurring opinion). By hypothesis there is already an investigatory lead, else the state would not be interested enough in the testimony to provide immunity. No such circumstances exists with regard to the person required to come forward and pay the federal wagering tax. Congress might well think that the possible revenues to be expected from taxes on wagers do not justify a procedure that would: (1) bar state and federal prosecution of gamblers in many cases; (2) make such prosecutions more time-consuming and difficult in all cases; and (3) invite perjury by law enforcement officials in some cases, and claims of such perjury in many more cases.

These considerations lend force to the view we have advanced throughout this case that if a use-restriction rule is to be adopted, it is for the Congress, and not for the Court, to adopt it (Pet. Br. 26-27; Pet. Rearg. Br. 20). There is more than one way in which Congress could provide for taxing wagers without requiring self-incrimination, if Congress should choose to do so. The choice among these methods is properly for the Congress. It alone knows how much it wants this revenue, and to what extent it is prepared to interfere with the prosecution of gamblers, and to exercise its constitutional supremacy, to achieve that end.

In that respect this case differs markedly from *Murphy*. As pointed out by the Second Circuit in *United States v. Chandler*, ... F.2d .... (2d Cir. 1967)

(quoted in *Marchetti* Rearg. Br. 27-28), *Murphy* "dealt with the problems of adjustment in federal-state relationships when incriminating testimony is compelled under a state immunity statute. No such statute, state or federal, is invoked here * * *." The present problem is not confined to state-federal relationships, and there is no statute purporting to provide any degree of immunity. Indeed to the extent Congress has spoken it has said, in 26 U.S.C. § 4422, that it does not want any immunity to be given. In *Murphy* a state wanted information enough that it was willing, so far as it could, to grant immunity under its statutory procedure. This Court undertook to devise a rule that would respect the constitutional privilege of the witnesses without, on the one hand, frustrating the state's desire, or, on the other, disrupting enforcement of federal criminal laws.

If it is appropriate for this Court to devise a use-restriction to save an otherwise unconstitutional statute, then *Albertson* would have been a more appropriate case than is the present case in which to do so. In the statute involved in *Albertson* Congress had attempted to provide immunity, but had not gone far enough in this direction to give complete protection from all the perils against which the constitutional prohibition was designed to guard. It would have been easier for the Court to take the additional step and restrict the use of the fruits of the registration statement there, thus carrying out the apparent congressional purpose, than it is for the Court to devise a use restriction and read it into a statute that gives no hint than Congress intended any restriction of any kind.

The United States asserts that it is fear of use in a state prosecution that here creates the basic tension

between the taxing power and the privilege (Govt. Rearg. Br. 31) and that "a person who operates a wagering business within a single State is in no apparent danger of federal prosecution as a result of paying the occupational and excise taxes and filing the required forms" (Govt. Rearg. Br. 31 n. 28). The facts of *United States v. Ross*, 374 F.2d 227 (6th Cir. 1967), petition for certiorari pending, No. 77, O. T. 1967, raise doubt about this. Ross had dutifully bought his wagering tax stamp and paid the excise tax on the wagers he took in. Two FBI agents, "knowing that the appellant had a Federal Wagering Tax Stamp, went to his residence to interview him with respect to gambling." 374 F.2d at 229. He was not home, but as the agents walked across the rear of his lot they found in an overturned garbage can a publication that he had received in the mail from Chicago in which there were schedules of football games played during the latter part of December and the early part of January. He was convicted of using a facility in interstate commerce to facilitate the carrying on of gambling, in violation of 18 U.S.C. § 1952, and was fined $5000 and put on probation for two years. His conviction was affirmed by the Sixth Circuit. The facts in *Gillespie v. United States*, 368 F.2d 1 (8th Cir. 1966), are similar, if somewhat less extreme, but the convictions there, under § 1084 of the Criminal Code as well as § 1952, were set aside because the initial search by state authorities, from which the federal prosecution stemmed, was based on an insufficient showing of probable cause. With cases like these on the books, and they do not stand alone, the claim that a person who operates within a single state "is in no apparent danger of federal prosecution" must be meant in a Pickwickian sense.

If, as we contend, the existing statutory scheme with regard to the wagering excise tax compels self-incrimination, and is unconstitutional for that reason, there are ways by which the statute can be amended to collect the tax without compelling self-incrimination, but the choice of how this should be done, if at all, is properly for the legislative branch of government.

C. Disposition of This Case If a Use Restriction Should Be Adopted

When this case, and its companion case, were here last term, the United States made a very brief argument for the proposition that the convictions in these cases should stand even if the Court should hold that the statute can be saved only by reading into it a restriction on use of the incriminating information. (Govt. Br. 28-29; Govt. *Costello* Br. 25-26). The United States adheres to that view in its latest brief (Govt. Rearg. Br. 41 n. 39) though it simply refers to its earlier briefs to support its position.

Petitioner does not believe, as has been indicated, that it would be appropriate for this Court to adopt a use restriction to save this statute, but contends that even if it were, reversal would be required in this case. We will not repeat what we have said before (Pet. Br. 28-29), relying on *Raley v. Ohio,* 360 U.S. 423, 426 (1959), and *Bouie v. City of Columbia,* 378 U.S. 347, 352 (1964). We would add to those authorities reference to *Stevens v. Marks,* 383 U.S. 234, 246 (1966). If, as there held, a witness has a constitutional right to stand on the privilege until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to

him, and "a declaration that there was a valid immunity uttered for the first time on appeal would come too late," *ibid.*, the same thing should be true of a taxpayer convicted of "willful failure" to file an incriminating return.

That petitioner's conviction should be reversed if, at the time he failed to pay the taxes in question, payment would have been incriminating and there were no restrictions on use of the evidence of payment seems a minimum consequence "of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno,* 388 U.S. 293, 301 (1967). Indeed we perceive no logical basis for failing to extend such a holding to all persons subject to this tax who were similarly circumstanced. To do so would not "seriously disrupt the administration of our criminal laws" nor require the "release of numerous prisoners." See *Johnson v. New Jersey,* 384 U.S. 719, 731 (1966). Statistics published by the Administrative Office of the United States Courts, of which this Court may properly take judicial notice, suggest that the dimension of the problem is very small. The following figures are for the combined fiscal years 1964 and 1965, the latest years available, and are taken from the publication, *Federal Offenders in the United States District Courts 1964,* pp. 30-31, and *ibid., 1965,* pp. 84-85. Of the 1598 persons convicted in federal courts in those two years of wagering tax violations, 1379 received either a suspended sentence, a fine, or probation, and only 219 were given jail sentences. The jail sentences of 150 offenders were for six months or less, and 56 other defendants received sentences ranging from seven to twelve months. Only 13 persons, then, were sentenced for more than one year. Of these 11 sentences were for two years or less, one was between two

and three years, and one was sentenced to nine years. A decision that the statute as it stands is unconstitutional, with or without a use restriction to save it for the future, will not lead to a general jail delivery.

D. The Communication With the Jury

The United States merely refers (Govt. Rearg. Br. 3 n. 2) to its earlier brief (Govt. Br. 30-34) for its position on the separate issue involved in this case about the communications between the trial court and the jury in the absence of defendant and his counsel. We are also content to stand on our earlier arguments (Pet. Br. 29-39) save for brief reference to two intervening developments.

The decision in *Chapman v. California,* 386 U.S. 18, 24 (1967), that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" strengthens petitioner's position on this aspect of the case. The *Chapman* rule might not apply if "the objection did not appear in the motion for new trial or in the assignments of error" and were presented on appeal as "a 'mere afterthought,'" *Johnson v. United States,* 318 U.S. 189, 201 (1943), but that is not this case.

The Court may also wish to take note of three recent decisions of the Supreme Court of Pennsylvania: *Gould v. Argiro,* 422 Pa. 433, 220 A.2d 654 (1966); *Kersey Mfg. Co. v. Rozic,* 422 Pa. 564, 222 A.2d 713 (1966); *Yarsunas v. Boros,* 423 Pa. 364, 223 A.2d 696 (1966). In these three decisions the Pennsylvania court has adopted the rule, even for civil cases, that communication between court and jury outside the presence of

counsel requires reversal without more. It adopted this attitude because prejudice is always possible from such communications but the existence of prejudice cannot be demonstrated, and because experience had shown the need for firm guidelines for trial judges in this sensitive area of judge-jury relations. State decisions are, of course, not authoritative here but these three cases are of interest as showing that petitioner's argument on this issue is not reliance on some ancient technicality but on a right regarded by a modern court as fundamental.

CONCLUSION

For the reasons set out here, and in petitioner's earlier briefs, the judgment below should be reversed, with instructions to dismiss the indictment as to counts 1 to 4 and 6 to 17 and to grant a new trial on counts 20 to 23.

Respectfully submitted,

JAMES E. MCLAUGHLIN
606 Frick Building
Pittsburgh, Pa. 15219
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Petitioner

September, 1967